

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: McMurray

Serial No.: 10/651,443

Filed: August 30, 2003

Confirmation No.: 8744

For: **COLOR-FAST STRETCH MATERIAL AND
METHOD OF MAKING SAME**

Appeal No. _____

Group Art Unit: 3765

Examiner: D. Worrell Jr.

Mail Stop: Appeal

Commissioner for Patents

P. O. Box 1450

Alexandria, VA 22313-1450

Sir:

Appeal Brief

This Appeal Brief is being transmitted in this application with respect to the Notice of Appeal filed on May 1, 2007. Authorization of charge to our firm's deposit account for \$500.00 is attached for the filing of the Appeal Brief. The Commissioner is hereby authorized to charge any additional fees that may be required to Deposit Account 501923.

This brief contains these items under the following headings, and in the order set forth below:

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APPELLANT'S BRIEF

1. Real Party in Interest

The real party in interest in this appeal is the McMurray Fabrics Incorporated, having a headquarters at PO Box 67, Aberdeen, North Carolina 28315.

2. Related Appeals and Interferences

There are no appeals or interferences that will directly affect or be directly affected by, or have a bearing on the Board's decision in this appeal.

3. Status of the Claims

Claims 1-11 and 13-19 are rejected. Claim 12 is cancelled. Claims 1-11 and 13-19 are subject to appeal.

4. Status of the Amendments

No amendments were submitted after final.

5. Summary of Claimed Subject Matter

Independent Claim 1 comprises a knitted fabric consisting essentially of a first, solution dyed component with substantial stretch properties and a second component with substantially lower stretch properties than those of the first component wherein the components are dyed prior to fabric formation for providing a knitted fabric having color-uniformity in both stretched and relaxed states.

The fabric is referenced in Figure 1A and 1B; the first, solution dyed component with substantial stretch properties is shown as 70; the second component with substantially lower stretch properties than those of the first component is shown as 69. Another embodiment of the Fabric is referenced in Figure 2, the first, solution dyed component with substantial stretch properties is shown as 58; the second component with substantially lower stretch properties than those of the first component is shown as 60. A first, solution dyed component with substantial stretch properties is referenced on page 6, lines 6-10. Solution dyeing is known in the textile arts, and refers to the introduction of pigments or insoluble dyes into the polymer melt or spinning solution prior to extrusion. A second component with substantially lower stretch properties than those of the first component is referenced on page 6, lines 10-20. Providing a knitted fabric having color-uniformity in both stretched and relaxed states is referenced, for example, on page 5, line 20 – page 6, line 5; page 7, line 23 – page 8, line 5, and in another embodiment on page 9, line 14 – page 10, line 10.

Independent Claim 11 comprises a stretch fabric comprising a first, solution dyed elastomeric component and a second substantially non-elastomeric component wherein the stretch fabric is a fabric formed by interconnecting the first and second components; and wherein

the first component and second component are solution-dyed prior to fabric formation thereby providing a stretch fabric having color-uniformity in both stretched and relaxed states.

The fabric is referenced in Figure 1A and 1B; the first, solution dyed component with substantial stretch properties is shown as 70; the second component with substantially lower stretch properties than those of the first component is shown as 69. Another embodiment of the Fabric is referenced in Figure 2, the first, solution dyed component with substantial stretch properties is shown as 58; the second component with substantially lower stretch properties than those of the first component is shown as 60. The first, solution dyed component with substantial stretch properties is referenced on page 6, lines 6-10. The second component with substantially lower stretch properties than those of the first component is referenced on page 6, lines 10-20. Providing a knitted fabric having color-uniformity in both stretched and relaxed states is referenced, for example, on page 5, line 20 – page 6, line 5; page 7, line 23 – page 8, line 5, and in another embodiment on page 9, line 14- page 10, line 10.

Independent Claim 14 comprises method of making a stretch fabric comprising the steps of: providing a first yarn component and a second yarn component for inclusion in a fabric; dyeing the yarn components separately; and fabricating a fabric from the yarn components, the first component having substantial stretch properties and the second component having substantially lower stretch properties than those of the first component, thereby providing a stretch fabric having color-uniformity in both stretched and relaxed states.

The method is referenced, generally, on page 7, lines 7-16, and certain examples of providing and fabricating are provided by Figures 1 and 2 and their corresponding descriptions of page 10, line 17 – page 11, line 14.

6. Grounds of Rejection to be Reviewed on Appeal

The following rejections are on appeal:

1. Are Claims 1-11 and 13-19 unpatentable under 35 U.S.C. §103 in light of United States Patent No. 5,533,789 (hereinafter “McLarty”)?

7. Arguments

7.1 Applicant's Invention is directed to a Specific Problem

Traditional stretch fabrics and garments are commonly colored by fabric-dyeing the finished fabric or by garment-dyeing the finished garment. These traditional techniques have worked satisfactorily for most stretch fabrics and garments produced thereby. Applicant, however, produces new fabrics that are used with new types of garments, and traditional coloring techniques are not always satisfactory.

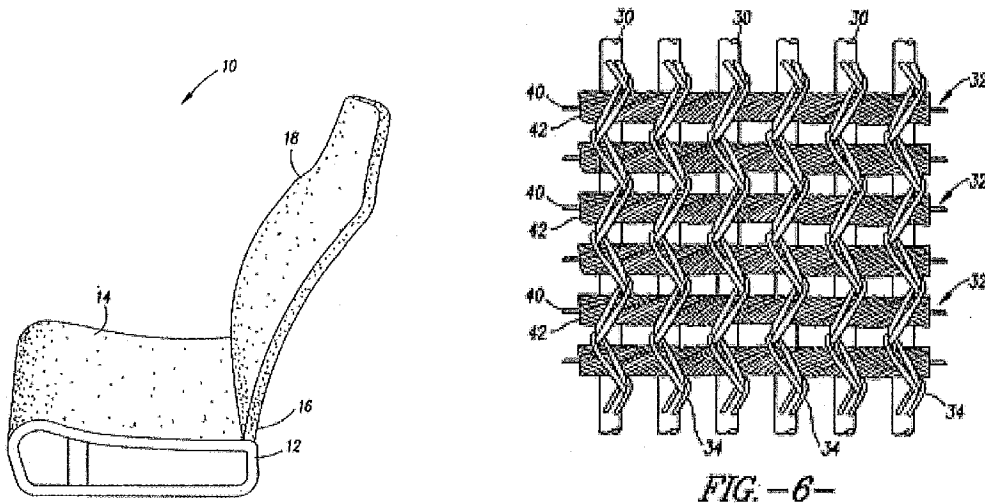
By way of example, Applicant uses stretch components, e.g., elastomeric yarns, to produce fabrics that have high degrees of stretch for garments that are configured to be tightly worn against the body. Because of Applicant's fabric construction, the stretch component of these fabrics becomes highly visible when the fabric is used in the garment form. Applicant has found this to be problematic in terms of color uniformity and batch-to-batch consistency. As set forth in Applicant's specification, garment-dyeing does not ensure color uniformity because stretch components may not be exposed to dye during the garment-dyeing process. For example, during dyeing the stretch component may be covered by the non-stretch component. Further, conditions required to adequately dye the non-stretch component may be too harsh for the stretch component and may degrade performance properties of the stretch component. Moreover, even if garment-dyed products have a uniform or desired color initially, dyes may bleed unevenly from stretch and non-stretch components after several launderings, further resulting in a non-uniform or unsatisfactory product.

Applicant does not believe that others have adequately addressed these problems, primarily because with traditional fabric constructions the stretch components are not typically visible during garment wear. For example, the stretch component may be wrapped in a yarn that

has been previously dyed, or may be positioned within the fabric construction such that it is hidden by other yarns in the fabric. As mentioned above, however, Applicant produces fabrics with high degrees of stretch and with a configuration that results in a highly visible stretch component when the fabric is in use. For these types of fabrics, when a wearer moves, any non-uniform dyeing of the stretch component is highly visible and highly undesirable. It is to overcoming these problems that the present invention is directed.

7.2 McLarty's Disclosure

In complete contrast to Applicant's technology, McLarty is directed to seating structures designed to eliminate support springs or support cushions. For context, McLarty's seating structure of Figure 1, and fabric of Figure 6 used to make seat of Figure 1, are provided below:



McLarty's fabric face or "aesthetic side" is shown in Figure 6. McLarty's fabric includes wrapped filament yarns 32, which include a highly elastomeric core 40, e.g., SPANDEX,

wrapped with an aesthetically pleasing yarn 42. Yarn 30 is an elastomeric monofilament yarn. Yarn 34 is a knit filament yarn. McLarty discloses that knit filament yarn 34 is preferably a solution dyed polyester. See, generally, McLarty's col. 3, lines 23-48

7.3 McLarty Does Not Render Claims 1-11 and 13-19 Obvious

The Examiner concedes that McLarty does not disclose Applicant's first, solution dyed component with substantial stretch properties, but argues that it would be obvious to solution dye McLarty's yarn 30. It is the burden of the Examiner to establish a prima facie case of obviousness when rejecting claims under 35 U.S.C. §103. In re Reuter, 651 F.2d 751, 210 USPQ 249 (CCPA 1981). In this case, the Examiner has failed to meet this burden.

7.3.1 There Must be a Basis in the Art for Making the Modification

It has been repeatedly held by the Court of Appeals for the Federal Circuit that absent some teaching, suggestion, or incentive supporting a combination of references, obviousness cannot be established by combining the teachings of the prior art. ACS Hospital Systems, Inc. v. Montefiori Hospital, 732 F.2d 1572, 1577, 221 USPQ 929, 939 (Fed.Cir. 1984). This has been interpreted to mean that there must be a reasonable intrinsic or extrinsic justification for the proposed combination of references in order to properly reject the claims of an invention. The examiner must propose some logical reason apparent from the evidence of record that justifies his combination or modification of references. In re Regel, 188 USPQ 132 (CCPA 1975). Therefore, it is important in the instant situation to examine whether or not there exists a reasonable intrinsic or extrinsic justification for the proposed modification to McLarty.

The Examiner contends that the modification to McLarty is obvious “so that the dye is distributed evenly throughout the yarn rather than generally on the yarn surface”. With all due respect to the Examiner, the Examiner’s stated motivation is basically a restatement of the definition of solution dyed yarn, it is not a motivation for McLarty to solution dye yarn 30. What is McLarty’s motivation for using a solution dyed yarn 30? McLarty makes no disclosure that yarn 30 is ever visible or that yarn 30 contains any dye on its surface. Rather, McLarty’s disclosure strongly suggests that yarn 30 is not visible as discussed below.

For example, yarn 30 is on the underside or “performance side” of the fabric, which is the side of the fabric facing inward on the chair (see, for example, Fig 6, and col. 3, lines 30-32). Applicant does not believe that the internal yarns of McLarty’s seat are visible.

Further, McLarty’s fabric does not stretch in a way that would make yarn 30 visible. McLarty discloses that “it is important that any seating support structure have a limited degree of movement when loads are applied” (col. 3, lines 10-12), showing, generally, that stretch is limited. More specifically with regard to yarn 30, McLarty discloses that McLarty’s fabric is designed to have limited elongation in the warp direction, which is the direction of yarn 30 (see, for example, col. 3, line 25 and col. 1, lines 66-67). If any stretch did occur with McLarty’s fabric, it would be in the weft direction, whereby yarn 30 would still be covered by yarns 32 and 34. Finally, even if McLarty’s fabric did stretch enough so that portions of yarn 30 were not blocked by yarns 32 and 34, yarn 30 would still be covered by the person sitting on McLarty’s seat 10. Yarn 30 is not visible and was not intended to be visible. Applicant respectfully believes that McLarty provides no disclosure that yarn 30 is dyed on its surface, and has provided no motivation for solution dyeing yarn 30.

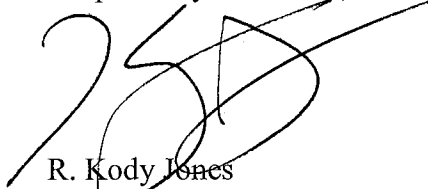
As discussed above, Applicant uses a solution dyed yarn for a specific reason to overcome a specific problem. McLarty is not concerned with the same problems to which the present invention is addressed, nor is McLarty concerned with any problems that would motivate one of ordinary skill in the art to solution dye yarn 30.

Thus, it is submitted that the Examiner failed to justify the alleged modification to McLarty. When the prior art itself provides no apparent reason for one of ordinary skill in the art to make a modification, an argument properly exists that the claimed subject matter would not have been obvious.

7.4 Conclusion

Applicant respectfully submits that the Examiner is incorrect in his belief that Claims 1-11 and 13 -19 are unpatentable in light of McLarty and requests that the Board reverse the rejection of the claims.

Respectfully submitted,



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8. Claims Appendix

The appealed claims are as follows:

1. A knitted fabric consisting essentially of a first, solution dyed component with substantial stretch properties and a second component with substantially lower stretch properties than those of the first component wherein the components are dyed prior to fabric formation for providing a knitted fabric having color-uniformity in both stretched and relaxed states.
2. The knitted fabric according to claim 1, wherein at least one of the components is solution dyed.
3. The knitted fabric according to claim 1, wherein both of the components are solution dyed.
4. The knitted fabric according to claim 1, wherein the fabric is a warp-knitted fabric.
5. The knitted fabric according to claim 1, wherein the fabric is a weft-knitted fabric.
6. The knitted fabric according to claim 1, wherein the components are dyed separately.
7. The knitted fabric according to claim 1, wherein the second component is synthetic.
8. The knitted fabric according to claim 7, wherein the second component is polyester.

9. The knitted fabric according to claim 1, wherein the components comprise solution dyed thermal heat settable synthetic continuous filament yarns selected from a group consisting of Polyamide (Nylon), Polyester, Olefin (Polypropylene), Spandex, and the like, and combinations thereof.

10. The knitted fabric according to claim 1, wherein the fabric includes additives to provide performance properties including anti-bacterial, hydrophylic, hydrophobic, resistance to chlorine, quick drying, and combinations thereof.

11. A stretch fabric comprising a first, solution dyed elastomeric component and a second substantially non-elastomeric component wherein the stretch fabric is a fabric formed by interconnecting the first and second components; and wherein the first component and second component are solution-dyed prior to fabric formation thereby providing a stretch fabric having color-uniformity in both stretched and relaxed states.

12.(Cancelled)

13. The stretch fabric according to claim 11, wherein the components comprise solution dyed thermal heat settable synthetic continuous filament yarns selected from a group consisting of Polyamide (Nylon), Polyester, Olefin (Polypropylene), Spandex, and the like, and combinations thereof.

14. A method of making a stretch fabric comprising the steps of:

providing a first yarn component and a second yarn component for inclusion in a fabric;
dyeing the yarn components separately; and
fabricating a fabric from the yarn components, the first component having substantial stretch properties and the second component having substantially lower stretch properties than those of the first component, thereby providing a stretch fabric having color-uniformity in both stretched and relaxed states.

15. The method according to claim 14, wherein the step of fabricating the fabric includes manufacturing by knitting, weaving, non-woven or other fabric manufacturing process.

16. The method according to claim 14, further including the steps of scouring the fabric and/or treating the fabric.

17. The method according to claim 16, wherein the step of treating the fabric includes applying a finish for enhanced fabric performance.

18. The method according to claim 17, wherein the finish includes anti-microbial, stain resistant, water resistant, water repellant, wicking agents and/or treatments, and combinations thereof.

19. The method according to claim 14, further including the steps of fabric processing including garment manufacturing or any steps in preparation therefore.

9. Evidence Appendix

This reference was cited by the Examiner in making rejections, and Applicant relies on portion of it to show the errors of the rejections. A copy is attached.

Patent Number	1st Named Inventor	Examiner Cited in Office Action Dated
5,533,789	McLarty,III	May 19, 2005

10. Related Proceedings Appendix

None.